***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

# INDEX


| | Page |
|---|---|
| Questions presented | 1 |
| Statutes involved | 1 |
| Statement of the case | 2 |
| Argument: | |
| I. Appellant's jurisdictional attack on his indictment and conviction is without merit | 6 |
| A. The sports bribery statute extends to harness racing | 6 |
| B. The alleged failure of the sports bribery statute to extend to harness racing would not have licensed appellant to make false statements to the grand jury with impunity | 8 |
| II. Appellant received a fair trial | 11 |
| A. The trial court properly denied appellant a continuance | 11 |
| B. Appellant was both partially responsible for and not prejudiced by the nonappearance as a witness of the person who had prepared the 1099 form | 13 |
| C. Appellant was not prejudiced by improper jury instructions | 16 |
| Conclusion | 18 |
| Certificate of service | 18 |


## CITATIONS

Cases:


| | |
|---|---|
| Billeci v. United States, 184 F. 2d 394 | 17 |
| Blair v. United States, 250 U.S. 273 | 9 |
| Brady v. Maryland, 373 U.S. 83 | 14 |

Cases continued:


| | Page |
|---|---|
| Boehm v. United States, 123 F. 2d 791, certiorari denied, 315 U.S. 800 | 10 |
| Giles v. Maryland, 386 U.S. 66 | 14 |
| Hickory v. United States, 160 U.S. 408 | 17 |
| Quercia v. United States, 289 U.S. 466 | 17 |
| Starr v. United States, 153 U.S. 614 | 17 |
| United States v. Neff, 212 F. 2d 297 | 10 |
| United States v. Remington, 208 F. 2d 567, certiorari denied, 347 U.S. 913 | 9 |
| United States v. Williams, 341 U.S. 58 | 9, 10 |


Statutes:


| | |
|---|---|
| 18 U.S.C. 224 | 6, 8, 9 |
| subsection (b) | 8 |
| subsection (c)(2) | 6 |
| subsection (c)(3) | 6, 7 |
| 18 U.S.C. 1001 | 8 |
| 18 U.S.C. 1621 | 9, 10 |
| 18 U.S.C. 1623 | 2, 10 |


Miscellaneous:


| | |
|---|---|
| 1964 U.S. Code Cong. & Adm. News | 8 |
| 1970 U.S. Code Cong. & Adm. News | 10 |
| Webster's Third New International Dictionary of the English Language Unabridged | 6 |

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 74-1202

UNITED STATES OF AMERICA,
Appellee

v.

JOSEPH PINTO,
Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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# BRIEF FOR APPELLEE

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## QUESTIONS PRESENTED

1. Whether appellant's indictment and conviction suffers from a jurisdictional defect.

2. Whether appellant was deprived of a fair trial by:

   a. The denial of a continuance.

   b. The nonappearance of a witness assertedly in possession of evidence favorable to his defense.

   c. Improper jury instructions.

## STATUTES INVOLVED

18 U.S.C. 224 provides:

> Bribery in sporting contests.
>
> (a) Whoever carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in commerce to influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest, shall be fined not more than $10,000, or imprisoned

not more than 5 years, or both.

(b) This section shall not be construed as indicating an intent on the part of Congress to occupy the field in which this section operates to the exclusion of a law of any State, territory, Commonwealth, or possession of the United States, and no law of any State, territory, Commonwealth, or possession of the United States, which would be valid in the absence of the section shall be declared invalid, and no local authorities shall be deprived of any jurisdiction over any offense over which they would have jurisdiction in the absence of this section.

(c) As used in this section-

(1) The term "scheme in commerce" means any scheme effectuated in whole or in part through the use in interstate or foreign commerce of any facility for transportation or communication;

(2) The term "sporting contest" means any contest in any sport, between individual contestants or teams of contestants (without regard to the amateur or professional status of the contestants therein), the occurrence of which is publicly announced before its occurrence;

(3) The term "person" means any individual and any partnership, corporation, association, or other entity.

18 U.S.C. 1623 provides in pertinent part:

False declarations before grand jury or court

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration * * * shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * *

## STATEMENT OF THE CASE

After a three day jury trial in the United States District Court for the Eastern District of New York, appellant was convicted on a one-count indictment charging him with making false material declarations before a grand jury, in violation of 18 U.S.C. 1623. He was sentenced to one year's imprisonment with all but sixty days suspended, and placed on probation for eighteen months.

Appellant had been called as a witness before a grand jury investigating possible bribery affecting harness racing. He had cashed a winning superfecta ticket (a type of wager requiring selection, in order, of the first four horses in a race) purchased from the Off Track Betting Corporation (hereafter called O.T.B.). It was thought that he had been retained, for a percentage, to cash the ticket on behalf of its real owner. By questioning him, the grand jury hoped to identify, as possible bribery suspects, the real parties in interest to certain large wagers placed with O.T.B. (Tr. 144-145).[1/] The essence of his false declarations was that he had purchased the ticket himself.[2/]

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1/ "Tr." refers to the transcript of the trial itself; the transcript of other proceedings is referred to by "Tr." plus the date and, where relevant, the time; "A." refers to appellant's appendix.

2/ The full declarations charged to be false by the indictment were (A. 4a-5a):

Q. Mr. Pinto, last time you were here you were telling us about winning a Superfecta on March 8. Was that one ticket that you won?

A. I had one ticket I won. That's right. I had bought five tickets.

Q. You had bought five tickets?

A. Right. And here is my daughter's birth certificate and you will find the numbers on here. I also parked my car in midtown the day before, I think, and on the sticker was 1248. My daughter was born January 24, 1956.

Q. What were the other tickets?

A. 1245, 1246, 1248 and 1256. That's my daughter's birthday and 1268, I think.

Q. What kind of tickets were these?

A. $72 box tickets.

Q. So you bought five $72 box tickets?

A. Right.

Q. Mr. Pinto, I want to get something very clear. Did you

In two appearances before the grand jury, appellant had testified that on March 8, 1973, he had purchased, at an O.T.B. branch which he identified by address, five $72 superfecta tickets[3] all at one time, four being losers and one being a winner worth $1272.00 (Tr. 17-19). When interviewed by an F.B.I. agent, he stated that he had purchased the tickets all at one time rather than going back five times to purchase each ticket separately (Tr. 164).

Appellant cashed a winning superfecta ticket two days later at another branch; it was the only winning superfecta ticket cashed at that branch on that day (Tr. 58, 69). He was identified as the person who cashed the ticket by the 1099 form which the Internal Revenue Service requires for all high odds winners (Tr. 23). In addition to showing that appellant was the person who cashed the ticket, the form indicated the ticket number and the branch at which it was cashed (ibid.). The ticket number in turn indicated the date upon which the ticket was purchased (Tr. 37); O.T.B. records showed that it was the only winning superfecta ticket for that date cashed in the name of appellant (Tr. 66-67).

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2/

purchase these tickets yourself.

A. I did.

Q. You didn't have anyone purchase them for you?

A. No.

3/ A $72 superfecta ticket consists, in effect, of twenty-four $3 wagers on four horses in all possible orders of finish from first to fourth. An $18 superfecta ticket consists, in effect, six $3 wagers, with one horse picked to win in all cases but with all possible orders of finish from second to fourth of the other three horses selected (Tr. 50-51).

The ticket number also indicated the branch and window at which the purchase was made (Tr. 33, 39-40); the branch was the one at which appellant testified to the grand jury he purchased his ticket (Tr. 40). The agent who served that window that day remembered the ticket as being one of a block of thirty-five $72 tickets purchased at one time by one individual (Tr. 127), whom she negatively identified as not being appellant (Tr. 128). The thirty-five tickets were divided into five groups of seven tickets in sequence; each group reflected a slight difference in the four horse selection for the race (Tr. 51). The ticket which appellant cashed was the fifth ticket in sequence in the group of seven winning tickets (Tr. 118). Had appellant bought five tickets at one time, as he claimed, his five tickets would have been numbered in sequence (Tr. 79). The other six tickets from the winning group were all cashed by the same individual, one Albery Levine (Tr. 111). There was an eighth winning superfecta ticket, not a part of the sequential purchase of thirty-five tickets, sold from the same window that day, but it was an $18 ticket rather than a $72 one (Tr. 60). All other winning superfecta tickets sold by O.T.B. that day were accounted for as being cashed by persons other than appellant (Tr. 70).

After his conviction, appellant, to show his cooperation with the government, identified Levine (the individual who had cashed the other six winning tickets) from F.B.I. photographs (Tr., 2/1/74 at 4-5).

## ARGUMENT

### I.

### APPELLANT'S JURISDICTIONAL ATTACK ON HIS INDICTMENT AND CONVICTION IS WITHOUT MERIT

Appellant contends that the Sports Bribery Statute (18 U.S.C. 224) does not extend to harness racing. On this basis, he argues that the grand jury had no jurisdiction to conduct its inquiry and that consequently the court below had no jurisdiction to try him for perjury committed during that inquiry. His argument, however, rests on two erroneous propositions. In the first place, harness racing is included within the ambit of §224. Even if it were not, he would not for that reason have been licensed to lie to the grand jury.

A. The Sports Bribery Statute Extends To Harness Racing.

Appellant urges that a plain reading of §224 demonstrates that bribery affecting harness racing is not included within its ambit. He reaches this result by noting that subsection (c)(2) of the statute defines a "sporting contest" to mean a contest between "individual contestants or teams of contestants"; this definition, he claims, is necessarily limited to humans and excludes animals (Br. 21). There is nothing in either the term "contestant" or the term "individual", however, which supports this interpretation. Webster's Third New International Dictionary of the English Language Unabridged defines "contestant" at p. 492 to mean "one that participates in a contest," and defines "one" at p. 1575 to mean "a certain indefinitely indicated person or thing" (emphasis added); "individual" is defined at p. 1152 to mean "a single or particular being or thing" (emphasis added). A race or test of skill between animals thus fits the statutory definition of "sporting contest" as clearly as does a race or test between humans.[4/]

4/ There is no merit to appellant's argument that "the statute itself equates individuals with 'persons'" (Br. 21) by reason of subsection (c)(3).

Moreover, harness racing does not test the skills of animals alone; the drivers are also an integral part of the contest. Indeed, the purpose of the grand jury investigation was to ascertain if any drivers had been bribed to misuse their skills and deliberately seek not to win their racing contests. Thus, even if contests which are solely between animals (such as greyhound races) were deemed not to fall within the statutory definition of "sporting contest," harness racing would still be included. The fact that, as appellant suggests, humans are not "the sole contestants" (Br. 20) does not mandate a different conclusion; it surely could not be maintained that auto, stock car, motorcycle, speedboat or sailboat racing are not "sporting contests," and yet in those sports the driver's or boatman's skill must be combined with the performance ability of the vehicle to achieve victory equally as much as a combination of driver's skill and performance ability of the horse is needed to achieve victory in harness racing.

The legislative history of the statute does not compel a different conclusion. While, as appellant asserts (Br. 22), Congress may have had such sports as baseball, football and basketball particularly in mind when it enacted the legislation, the enactment, as we have shown, was couched in broad enough terms to include harness racing. It is hardly to be thought that the reach of a statute which by its terms has a general impact is to be limited to the particular evils which prompted its birth. Nor is it of significance that harness racing, being a sport particularly adapted to legally sanctioned gambling, is heavily regulated by the states. Jai alai, another sport particularly adapted to legally

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That subsection defines the "person" who can enter into a sports bribery scheme or conspiracy rather than the "contestants" who participate in a "sporting contest," which is the issue here; the purpose of subsection (c)(3) is merely to make it clear that "person" is not limited to "individual" but embraces partnership, corporation, association or other like entity as well.

sanctioned gambling, is also for that reason heavily regulated by the states in which it is played, but even under appellant's limited definition it is unquestionably a "sporting contest" within the meaning of the statute. Indeed, Congress took note of the fact that most states have sports bribery statutes, but concluded that federal legislation was necessary because enforcement of state statutes "is becoming increasingly more difficult because of the interstate nature of many criminal activities." See 1964 U.S. Code Cong. & Adm. News at 2251. This basis for federal legislative action is as equally applicable to bribery affecting harness races as it is to bribery affecting any other sport. 5/

B. The Alleged Failure Of The Sports Bribery Statute To Extend To Harness Racing Would Not Have Licensed Appellant To Make False Declarations To The Grand Jury With Impunity.

Even if appellant were correct in his contention concerning the limited reach of the Sports Bribery Statute, it would not follow that he could make false declarations to the grand jury with impunity. In the first place, the grand jury's inquiry was not limited to violations of the Sports Bribery Statute. As the court below noted (Tr., 1/8/74, 10 AM, at 4), the suspected bribery, even if it were not a federal crime, could well have involved such collateral federal offenses as income tax evasion and the submission of false statements to the Treasury Department in violation of 18 U.S.C. 1001. The foreman in fact indicated in his testimony that the grand jury was interested in these collateral offenses (see Tr. 146).

Moreover, appellant would not have been licensed to lie to the grand jury even had its inquiry been limited to bribery alone and it were now held

5/ Congress made clear, by means of subsection (b) that the statute is merely to complement and not supplant state regulation of the subject matters.

that such bribery does not constitute a federal offense. Harness racing falls at least arguably within the reach of §224--in common parlance it is considered a sport, race results are carried in the sports section of the daily newspaper, etc. If an argument is to be made that it is nevertheless not a "sporting contest" within the meaning of §224, the proper person to make the argument is one who is accused of violating the statute, not a mere witness like appellant who is a stranger to the proceeding. As the Supreme Court held long ago, "it is in the ordinary case no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not." Blair v. United States, 250 U.S. 273, 282. Indeed, until the matter reaches the courts by means of an indictment under §224 charging bribery affecting harness racing, the reach of the statute cannot be authoritatively determined. Yet false declarations, such as those made by appellant, tend to frustrate the bringing of indictments. It follows that until the statute is authoritatively held not to extend to harness racing, grand juries have jurisdiction to investigate bribery affecting that sport. As the Supreme Court went on to say in Blair, "[a]t least the court and grand jury have authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction." 250 U.S. at 283.

In essence, appellant is in the same position as the witness who contended that his false testimony did not constitute perjury under 18 U.S.C. 1621 because the grand jury lacked venue jurisdiction for its inquiry and resultant substantive indictment, or the witnesses who contended that their false testimony during trial did not constitute perjury because the indictment being tried did not state an offense or was unlawfully procured. The contention in regard to trial testimony was rejected by the Supreme Court and this Court; that in regard to the grand jury's venue jurisdiction was rejected by the Third Circuit. United States v. Williams, 341 U.S. 58; United States v. Remington, 208 F. 2d 567, 569 (C.A.

2, 1953), certiorari denied, 347 U.S. 913; United States v. Neff, 212 F. 2d 297, 302 (C.A. 3, 1954); compare Boehm v. United States, 123 F. 2d 791, 809 (C.A. 8, 1941), certiorari denied, 315 U.S. 800.[6] As the Supreme Court said in Williams, "the federal statute against perjury is not directed so much at its effects as at its perpetration; at the probable wrong done the administration of justice by false testimony." 341 U.S. at 68.

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6/ The new 18 U.S.C. 1623, upon which this prosecution is based, is a liberalizing measure enacted "to facilitate Federal perjury prosecutions." See 1970 U.S. Code Cong. & Adm. News at 4008. It can hardly be thought, therefore, to contain an immunity from prosecution not contained in the older §1621. Indeed, §1621 possesses a limiting provision not possessed by §1623; under the former, false testimony must be both "material" and rendered "before a competent tribunal" to constitute perjury, while the latter punishes any "false material declaration" merely if it is made "before or ancillary to any court or grand jury of the United States." The jurisdictional argument raised against perjury prosecutions brought under §1621 was bottomed upon the "competent tribunal" requirement of that statute. See United States v. Williams, supra, 341 U.S. at 65. If the argument failed when raised under that statute, surely it must fail when raised under §1623 which has no "competent tribunal" requirement.

## II.

## APPELLANT RECEIVED A FAIR TRIAL

Appellant makes three spearate claims of unfairness in his trial. First, he asserts that he was wrongfully denied a continuance necessary to prepare his defense. Next, he charges that the prosecutor willfully withheld the identity of a witness in possession of evidence favorable to his defense. Finally, he complains of lack of impartiality in the court's instructions to the jury. None of his claims have merit.

### A. The Trial Court Properly Denied Appellant A Continuance

Appellant was arraigned on January 3, 1974; the arraignment, however, was on a superceding indictment (Tr. 1/3/74, at 9). He had originally appeared in court on August 25, 1973, without counsel, and was told to return on November 1 with counsel. He returned on November 8, still without counsel; the court set trial for January 7, 1974 and advised him that he had better retain an attorney (id., 3-4). Counsel first appeared for him at the January 3 arraignment and asked for a continuance, which was denied.[7/] Appellant now contends that denial of the continuance deprived him of the time necessary to prepare an adequate and effective defense--"time to attempt to arrange for a computer expert, time to interview people, time for the

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7/ The court did, however, set trial for January 8 rather than January 7 (id., 5).

computer expert to familiarize himself with the O.T.B. system so that he could intelligently address himself to the data which was quite extensive, and time to obtain more data on the O.T.B. system" (Br. 10).

The difficulty with this claim is that appellant's counsel never advised the trial court that this was the basis upon which the continuance was requested. Rather, except for a generalized statement that he needed more than four days "to prepare a defense" (Tr., 1/3/74 at 4), he requested only time in which to prepare motions--specifying one to dismiss for lack of jurisdiction and one relative to any prior criminal proceedings in which his client was involved (id., 3).[8/] Indeed, when the prosecutor announced, at the close of the first day of trial, that he contemplated calling a computer expert among his witnesses to be presented the next day, the court inquired of counsel whether there was "any special investigation you are going to need in connection with those witnesses," and counsel replied that he did not believe so (Tr. 62).

Since no special need for a continuance was called to the court's attention before trial--and, indeed, was affirmatively disclaimed during trial--it was a reasonable exercise of discretion for the court, having in mind that counsel's belated entrance into the case was solely the fault of

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8/ The necessity for a motion to determine appellant's prior criminal record (so that counsel could determine whether to put his client on the stand) became obviated when the prosecutor agreed to furnish counsel with any information he had on that subject and the court stated that any convictions not so furnished could not be used by the prosecutor for impeachment purposes (Tr., 1/3/74 at 6-8). Counsel pressed for additional time to prepare his papers on the jurisdictional issue "in detail," but the court informed him that it was not going to pay much attention to his contention and that this Court was the more appropriate forum in which to urge any jurisdictional issue (id., 6).

appellant, to hold to its original trial schedule. Appellant can hardly claim now that he was prejudiced by the denial of time to retain and consult a computer expert when in fact he never requested time for that purpose.

B. Appellant Was Both Partially Responsible For And Not Prejudiced By The Nonappearance As A Witness Of The Person Who Had Prepared The 1099 Form

Appellant's claim that the prosecutor deliberately withheld from him the identity of a witness with evidence favorable to his defense is grossly overstated. The potential witness was the individual who prepared the 1099 form when appellant cashed his winning superfecta ticket; appellant wished to examine him to develop the possibility that the wrong ticket number may have been written on the form, thus casting doubt upon the chain of proof which connected appellant's ticket with the block of thirty-five tickets and seven winning tickets purchased by someone else. Appellant does not and cannot assert that the witness would have proved his innocence; such an assertion could hardly be made in view of appellant's postconviction identification of the individual who had cashed the other six winning tickets in the block (see p. 5, supra)--an identification totally inconsonant with the grand jury testimony for which he was convicted that he had purchased his ticket himself. Nor does or can appellant assert that the witness would in fact have testified that the wrong ticket number was written on the form. As the evidence showed, such an error could have remained undetected by O.T.B.'s computer system only if the unaccounted for winning ticket from the block of seven had been cashed the same day at the same branch at which appellant cashed his ticket, and appellant's ticket number was erroneously recorded on the form made out for that ticket (Tr. 117); the evidence showed that no other winning superfecta ticket was cashed that day at that branch (Tr. 58). All that appellant can claim is

that, had the witness been available, examination of him might have confused the jury into finding a doubt where no basis for doubt existed.

This is thus not a case like Brady v. Maryland, 373 U.S. 83, where the prosecution in a homicide case withheld from the defense a statement by a co-defendant, relevant to the jury's assessment of punishment, admitting the actual homicide, or like Giles v. Maryland, 386 U.S. 66, where the prosecution in a rape case withheld from the defense information relevant to the question of whether the victim had consented to the intercourse. Unlike those cases, where the information withheld was clearly of value to the defense, here there was only a speculative possibility that the witness, if available, would have given helpful testimony.

Moreover, the fault lies at least partially with appellant's counsel that the witness was not identified and summoned; he had three opportunities in this regard of which he did not avail himself.[9/] The first came when the prosecutor announced in open court that he had available the agent on duty who cashed appellant's ticket, but added that sometimes tickets are cashed by the branch manager and the agent could not remember whether she had in fact cashed the ticket (Tr. 101-102). This should have put counsel on notice that the person available might not have been the one whom he wanted;

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9/ Appellant would appear to be correct in his assertion (Br. 17) that the O.T.B. employee whom his counsel called at the prosecutor's direction to ascertain the identity of the person who prepared the 1099 form refused, on the prosecutor's instructions, to divulge the information. The prosecutor, at a much earlier time, had instructed the employee not to divulge information without consulting him; apparently he forgot about that instruction when he talked to counsel and therefore failed to advise the employee that the specific information requested could be divulged.

nevertheless he neither made inquiry nor attempted to ascertain the identity of the branch manager. The second came when the agent testified that she did not prepare the 1099 form and did not know who did (Tr. 174-175). Counsel could have moved for a continuance in order to identify and summon the person who had prepared the form; he did not. The third came when, during discussion of the instructions, the prosecutor stated that he had just learned the identity of the person who prepared the form and offered to provide it to counsel so that the person could be summoned (Tr. 186). Counsel could have moved to reopen in order to summon this individual; he did not. The conclusion is compelling that counsel decided that a favorable "missing witness" instruction (see Tr. 185) would be more helpful to his case than an actual appearance by the witness.[10/]

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10/ There is no merit to appellant's complaint (Br. 15) against the actual "missing witness" instruction which the court gave (A. 19a-20a). In light of appellant's own responsibility for the nonappearance of the person who prepared the 1099 form, the instruction which appellant requested (Tr. 185) was clearly unwarranted.

C. Appellant Was Not Prejudiced By Improper Jury Instructions.

Appellant raises two main complaints against the trial court's instructions to the jury. First, he charges the court with misstating the testimony of a key government witness (Br. 13). Second, he urges that the court prejudiced him by giving voice to a probabilities estimate which found no support in the evidence (Br. 14).

Appellant's first complaint is captious. He is correct in stating (Br. 13) that what the witness had placed the trillion to one odds upon was the possibility of an error (such as a wrong ticket number being written on the 1099 form) remaining undetected by the computer (see Tr. 119-121). It was not a distortion of this testimony, however, for the court to state it to be that "the chances of error" were one in a trillion (A. 22a). It was academic, in determining whether the ticket cashed by appellant was purchased by somebody else, whether the computer could have made an error at some place along the line; what was significant was whether any error made could have remained undetected. The court's instruction, moreover, could have been understood by the jury only as referring to an undetected error (thereby correctly reflecting the witness' testimony), since the instruction spoke, as did the witness, of "the various checks and methods of detecting the errors and the relationship between the numbers on the ticket and the numbers on the magnetic drum as reflected on the print-out" (ibid.).

As the appellant's second complaint, it is true that there is no support in the record for the supposition voiced by the court that there was only one chance in a trillion that thirty-five similar wagers (such as those represented by the block of tickets from which appellant's ticket came) could have been

made by thirty-five, or even eighteen, different individuals (A.22a-23a). If the instruction amounted to error, however, the error was harmless. In the first place, the agent who sold the tickets testified that they were purchased by one individual. More importantly, appellant claimed to have purchased one winning and four losing tickets which, being purchased at the same time, would have had to have borne sequential numbers; the ticket which the 1099 form showed him to have cashed was the fifth of seven winning tickets purchased in sequence and numbered sequentially (see p. 5, supra). The possibility that the thirty-five tickets in the block could have been purchased by thirty-five or even eighteen separate individuals was therefore, by appellant's own testimony to the grand jury and statement to the FBI agent who interviewed him, irrelevant to his defense; his only hope of acquittal lay in the jury's doubting that the 1099 form correctly showed the ticket which he cashed to have been one of the block of thirty-five purchases.

This is thus not a case like those upon which appellant relies (see Br. 14-15). The trial court here did not, as in Billeci v. United States, 184 F. 2d 394, 400 (C.A. D.C., 1950), intimate to the jury that it would require a guilty verdict to be returned if the law permitted it to do so. It did not, as in Quercia v. United States, 289 U.S. 466, 468, suggest that the defendant's demeanor while testifying in his own defense indicated that he was lying. Nor was it guilty, as in Starr v. United States, 153 U.S. 614, 626-627, of expressing its indignation toward the defendant in terms which amounted to a harangue, or, as in Hickory v. United States, 160 U.S. 408, 421, of having "practically instructed that the facts were, under both divine and human law, conclusive proof of guilt." Rather, the most the court did here was to depreciate a possible factual defense which in any event was not realistically available to appellant.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction should be affirmed.

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MAY 1974

## CERTIFICATE OF SERVICE

I certify that two copies of this brief have been served by prepaid special delivery mail upon Joseph A. Faraldo, Esquire, 125-10 Queens Boulevard, Kew Gardens, New York 11415, attorney for appellant.

Marshall Tamor Golding / by Marshall Tamor Golding

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June 3, 1974